Supreme Court, U.S.
FILED
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No. 95-1228

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

JERRY E. WELLS AND KENNETH R. STEELE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: JANUARY 31, 1996
CERTIORARI GRANTED: APRIL 22, 1996

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UNITED STATES DISTRICT
FOR THE WESTERN DISTRICT OF MISSOURI

DOCKET NO. 93-CR-5006-ALL

UNITED STATES OF AMERICA, PLAINTIFF

v.

JERRY E. WELLS, ET AL., DEFENDANTS

DOCKET ENTRIES

1993

Feb. 11	(1)	INDICTMENT assigned to Judge Russell G. Clark Counts filed against Jerry E Wells (1) count(s) 1, 2, 3, 4, 5, Kenneth R. Steele (2) count(s) 1, 2, 3, 4, 5 (cd) [Entry date 02/11/93]
July 21	(131)	MOTION for judgment of acquittal at the close of all the evidence by defendant Jerry E Wells (nc) [Entry date 07/21/93]
July 21	(131)	ORDER by Judge Russell G. Clark granting motion for judgment of acquittal at the close of all the evidence as to Counts III and IV and denying motion for judgment of acquittal as to Counts I and II by defendant Jerry E Wells [131-1]

(DENIED ON FACE OF DOCUMENT) (nc) [Entry date 07/21/93]

July 21 (132) MOTION for judgment of acquittal at the close of all of the evidence by defendant Kenneth R Steele (nc) [Entry date 07/21/93]

July 21 (132) ORDER by Judge Russell G. Clark granting motion for judgment of acquittal at the close of all the evidence as to Counts III and IV and denied as to Counts I and II by defendant Kenneth R Steele [132-1] (DENIED ON FACE OF DOCUMENT) (nc) [Entry date 07/21/93]

July 21 (138) JURY INSTRUCTIONS - (Refused) (nc) [Entry date 07/21/93]

July 21 (140) MINUTE ENTRY: of 8th Day of Jury Trial All parties and the jury appear Defendant Steele continues presentation of testimony of Kenneth Steele Defendants Wells and Steele rest Court instructs the jury Respective counsel present closing arguments Jury retires to deliberate, returning with Guilty Verdicts, Counts 1 & 2, both defendants Court orders presentence investigation and report Defendants are continued on bond Court gives defendants until Friday, August 13,

1993 to file post trial motions (nc) [Entry date 07/26/93]

July 21 (142) VERDICT - We, the jury, find the defendant, Jerry E Wells, Guilty of the crime of conspiracy to make false statements as charged in Count One. We, the jury, find the defendant, Jerry E Wells, Guilty of the crime of making false statements to O'Bannon Bank in connection with the personal guaranties as charged in Count Two. (nc) [Entry date 07/26/93]

July 21 (143) VERDICT - We, the jury, find the defendant, Kenneth R Steele, Guilty of the crime of conspiracy to make false statements as charged in Count One. We, the jury, find the defendant Kenneth R Steele, Guilty of the crime of making false statements to O'Bannon Bank in connection with the personal guaranties as charged in Count Two. (nc) [Entry date 07/26/93]

Nov. 22 (186) JUDGMENT and Commitment issued to U.S. Marshal sentencing as to Jerry E Wells (1) count(s) 1, 2. Dft placed on probation for a term of 2 years on Count 1 and 2 years on Count 2 concurrent with Count 1. Dft shall 100 hrs of community service within the probationary No

fine. $100 MPA Party Jerry E Wells; Judge Russell Clark (jm) [Entry date 11/22/93]

Nov. 22 (187) JUDGMENT and Commitment issued to U.S. Marshal sentencing as to Kenneth R Steele (2) count(s) 1, 2. Dft placed on probation for a term of 2 years on Count 1 and 2 years on Count 2 concurrent with Count 1. Dft shall perform 100 hrs of community service within the probationary period. No fine. $100 MPA. Party Kenneth R Steele; Judge Russell Clark (jm) [Entry date 11/22/93]

Nov. 29 (191) NOTICE OF APPEAL by defendant Kenneth R Steel from Dist. Court decision [187-3] Filed 11/22/93 Entered 11/22/93 Paid $105 Rct. # 69120 (Transcripts have been prepared) (cd) [Entry date 12/02/93]

Nov. 29 (194) NOTICE OF APPEAL by defendant Jerry E Wells from Dist. Court decision [186-2] Filed 11/22/93 Entered 11/22/93 Paid $105 Rct. # 69145 (trans already prepared) (cd) [Entry date 12/03/93]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DOCKET NO. 93-3924

UNITED STATES OF AMERICA

v.

JERRY E. WELLS

DOCKET ENTRIES

12/7/93 Criminal Case Docketed (dkm) [93-3924]

12/7/93 REMARKS: 18:371 Lending, credit institutions; appealing conviction and sentence; defendant placed on 2 years probation; 100 hours community service; fine waived; $100 Special Assessment; 8 day trial [93-3924] (dkm) [93-3924]

2/22/94 BRIEF FILED - Brief of Appellants - Jerry E. Wells in 93-3924, Kenneth R. Steele in 93-3932. 60 pgs - w/ addendum 10 copies - w/ service 2/22/94. [93-3924, 93-3932, 94-1031] [404051] (sjo) [93-3924 93-3932 94-1031]

4/13/94 BRIEF FILED - Brief of Aplee/cr. Aplnt - Appellee USA in 93-3924, Appellee USA in 93-3932, Appellant USA in 94-1031, Appellant USA in 94-1031. 60 pgs - w/ addendum

- 11 copies w/ service 4/12/94. [93-3924, 93-3932, 94-1031] [423555] (sjo) [93-3924 93-3932 94-1031]

5/10/94 BRIEF FILED - Reply Brief of Aplnt/cr. Aplee - Jerry E. Wells in 93-3924, Kenneth R. Steele in 93-3932. 34 pgs - addendum - 10 copies - w/ service 5/9/94. [93-3924, 93-3932, 94-1031] TO COURT. [432522] (sjo) [93-3924 93-3932 94-1031]

5/24/94 BRIEF FILED - Reply Brief of Aplee/cr. Aplnt - USA in 93-3924, USA in 93-3932, USA in 94-1031. 11 pgs - 15 copies w/ service 5/23/94. [93-3924, 93-3932, 94-1031] TO COURT. [438556] (sjo) [93-3924 93-3932 94-1031]

6/13/94 ARGUED AND SUBMITTED IN ST. LOUIS, MO TO JUDGES Morris S. Arnold, Circuit Judge, John R. Gibson, Senior Judge, Michael J. Melloy, Visiting Judge (Chief Dist. Ct. Judge, Northern Iowa). James R. Wyrsch for Appellant Jerry E. Wells in 93-3924, James R. Wyrsch for Appellant Kenneth R. Steele, Appellant Kenneth R. Steele in 93-3932, James R. Wyrsch for Appellee Jerry E. Wells in 94-1031. Mark C. Thompson for Appellee USA in 93-3924/3932/94-1031. Rebuttal by: James R. Wyrsch. RECORDED. [93-3924, 93-3932, 94-1031] (mjh) [93-3924 93-3932 94-1031]

6/22/95 JUDGE ORDER: The parties are directed to file five copies of letter briefs not to exceed five pages on or before July 5, 1995, commenting upon the effect of United States v. Michael E. Gaudin, No. 94-514, 1995 WL 360212 (U.S. June 19, 1995), on these appeals. [93-3924, 93-3932, 94-1031] [586130] Supplemental briefs due on 7/5/95 in 93-3924, in 93-3932, in 94-1031 (lcd) [93-3924 93-3932 94-1031]

7/5/95 BRIEF FILED - Supplemental letter brief of appellee, USA in 93-3924, 93-3932, 94-1031 per court's request and order of 6/22/95 w/ service 7/3/95 [93-3924, 93-3932, 94-1031] TO COURT [590867] (lcd) [93-3924 93-3932 94-1031]

7/5/95 BRIEF FILED - Supplemental appellant letter brief with attached addendum filed per court's request and order of June 22, 1995, by Jerry E. Wells in 93-3924 and 94-1031, Kenneth R. Steele in 93-3932 w/ service 7/5/95. [93-3924, 93-3932, 94-1031] [590878], TO COURT. (lcd) [93-3924 93-3932 94-1031]

7/11/95 28(j) citation supplementing appellant's letter brief on pages 3 & 4, received and filed from Appellant Jerry E. Wells in 93-3924, Appellant Kenneth R. Steele in 93-3932, Appellee Kenneth R. Steele in 94-1031, Appellee Jerry E. Wells in 94-1031 TO COURT. [93-3924, 93-3932, 94-1031] [593295] (lcd) [93-3924 93-3932 94-1031]

8/21/95 THE COURT: Morris S. Arnold, John R. Gibson, Michael J. Melloy. OPINION FILED by Michael J. Melloy PUBLISHED . [93-3924, 93-3932, 94-1031] [607786] (mls) [93-3924 93-3932 94-1031]

8/21/95 JUDGMENT: Morris S. Arnold, John R. Gibson, Michael J. Melloy: The judgment of the district court is VACATED and the case REMANDED to the District Court in accordance with the opinion. [93-3924] [607787] (mls) [93-3924]

10/2/95 JUDGE ORDER: granting appellee motion extend petition for rehearing time with suggestion for rehearing en banc. [613631-1] [93-3924, 93-3932, 94-1031] in 93-3924, 93-3932, 94-1031 Petition for Rehearing due on 10/5/95 in 93-3924, in 93-3932, in 94-1031 (lcd) [93-3924 93-3932 94-1031]

10/5/95 PETITION for REHEARING with suggestions for rehearing en banc. Filed by Appellee USA in 93-3924, 93-3932, and 94-1031. , w/ service 10/4/95., TO COURT. [93-3924, 93-3932, 94-1031] (lcd) [93-3924 93-3932 94-1031]

11/2/95 JUDGE ORDER: denying petition for Rehearing for suggestion for rehearing en banc [625722-1] filed by USA, USA, USA, USA. Petition for panel Rehearing is also denied. [93-3924, 93-3932, 94-1031] [635646]

in 93-3924, 93-3932, 94-1031 (lcd) [93-3924 93-3932 94-1031]

2/7/96 U.S. Supreme Court notice regarding petition for writ of certiorari. Filed in the Supreme Court on 2/1/96. Supreme Ct. Case No.: 95-1228 [93-3924, 93-3932, 94-1031] [671647] (lcd) (93-3924 93-3932 94-1031]

5/2/96 U.S. Supreme Court order granting Supreme Court notice for certiorari [671647-1] in 93-3924, 93-3932, 94-1031. Order filed in the Supreme Court on 4/22/96 Sup. Ct. No. 95-1228 [93-3924, 93-3932, 94-1031] (lcd) [93-3924 93-3932 94-1031]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Docket No. 93-3932

UNITED STATES OF AMERICA

v.

KENNETH R. STEELE

DOCKET ENTRIES

12/7/93 Criminal Case Docketed (dkm) [93-3932]

12/7/93 REMARKS: 18:371 Lending, credit institutions; appealing conviction and sentence; 2 years probation; 100 hours community service; No fine; Special Assessment $100; 8 day trial. [93-3932] (dkm) [93-3932]

2/22/94 BRIEF FILED - Brief of Appellants - Jerry E. Wells in 93-3924, Kenneth R. Steele in 93-3932. 60 pgs - w/ addendum 10 copies - w/ service 2/22/94. [93-3924, 93-3932, 94-1031] [404051] (sjo) [93-3924 93-3932 94-1031]

4/13/94 BRIEF FILED - Brief for Aplee/cr. Aplnt - Appellee USA in 93-3924, Appellee USA in 93-3932, Appellant USA in 94-1031, Appellant USA in 94-1031. 60 pgs - w/ addendum - 11 copies w/ service 4/12/94. [93-3924, 93-3932, 94-1031] [423555] (sjo) [93-3924 93-3932 94-1031]

5/10/94 BRIEF FILED - Reply Brief of Aplnt/cr. Aplee - Jerry E. Wells in 93-3924, Kenneth R. Steele in 93-3932. 34 pgs - w/ addendum - 10 copies - w/ service 5/9/94. [93-3924, 93-3932, 94-1031] TO COURT. [432522] (sjo) [93-3924 93-3932 94-1031]

5/24/94 BRIEF FILED - Reply Brief of Aplee/cr. Aplnt - USA in 93-3924, USA in 93-3932, USA in 94-1031. 11 pgs - 15 copies w/ service 5/23/94. [93-3924, 93-3932, 94-1031] TO COURT. [438556] (sjo) [93-3924 93-3932 94-1031]

6/13/94 ARGUED AND SUBMITTED IN ST. LOUIS, MO TO JUDGES Morris S. Arnold, Circuit Judge, John R. Gibson, Senior Judge, Michael J. Melloy, Visiting Judge (Chief Dist. Ct. Judge, Northern Iowa). James R. Wyrsch for Appellant Jerry E. Wells in 93-3924, James R. Wyrsch for Appellant Kenneth R. Steele, Appellant Kenneth R. Steele in 93-3932, James R. Wyrsch for Appellee Jerry E. Wells in 94-1031. Mark C. Thompson for Appellee USA in 93-3924/3932/94-1031. Rebuttal by: James R. Wyrsch. RECORDED. [93-3924, 93-3932, 94-1031] (mjh) [93-3924 93-3932 94-1031]

6/22/95 JUDGE ORDER: The parties are directed to file five copies of letter briefs not to

exceed five pages on or before July 5, 1995, commenting upon the effect of United States v. Michael E. Gaudin, No. 94-514, 1995 WL 360212 (U.S. June 19, 1995), on these appeals. [93-3924, 93-3932, 94-1031] [586130] Supplemental briefs due on 7/5/95 in 93-3924, in 93-3932, in 94-1031 (lcd) [93-3924 93-3932 94-1031]

7/5/95 BRIEF FILED - Supplemental letter brief of appellee, USA in 93-3924, 93-3932, 94-1031 per court's request and order of 6/22/95 w/ service 7/3/95 [93-3924, 93-3932, 94-1031] TO COURT [590867] (lcd) [93-3924 93-3932 94-1031]

7/5/95 BRIEF FILED - Supplemental appellant letter brief with attached addendum filed per court's request and order of June 22, 1995, by Jerry E. Wells in 93-3924 and 94-1031, Kenneth R. Steele in 93-3932 w/ service 7/5/95. [93-3924, 93-3932, 94-1031] [590878], TO COURT. (lcd) [93-3924 93-3932 94-1031]

8/21/95 JUDGMENT: Morris S. Arnold, John R. Gibson, Michael J. Melloy: The judgment of the district court is VACATED and the case REMANDED to the District Court in accordance with the opinion. [93-3932] [607793] (mls) [93-3932]

10/2/95 JUDGE ORDER: granting appellee motion extend petition for rehearing time with suggestion for rehearing en banc.

[613631-1] [93-3924, 93-3932, 94-1031] in 93-3924, 93-3932, 94-1031 Petition for Rehearing due on 10/5/95 in 93-3924, in 93-3932, in 94-1031 (lcd) [93-3924 93-3932 94-1031]

10/5/95 PETITION FOR REHEARING with suggestions for rehearing en banc. Filed by Appellee USA in 93-3924, 93-3932, and 94-1031. w/ service 10/4/95. TO COURT. [93-3924, 93-3932, 94-1031] (lcd) [93-3924 93-3932 94-1031]

11/2/95 JUDGE ORDER: denying petition for Rehearing with suggestion for rehearing en banc [625722-1] filed by USA, USA, USA, USA. Petition for panel Rehearing is also denied. [93-3924, 93-3932, 94-1031] [635646] in 93-3924, 93-3932, 94-1031 (lcd) [93-3924 93-3932 94-1031]

2/7/96 U.S. Supreme Court notice regarding petition for writ of certiorari. Filed in the Supreme Court on 2/1/96. Supreme Ct. Case No.: 95-1228 [93-3924, 93-3932, 94-1031] [671647] (lcd) [93-3924 93-3932 94-1031]

5/2/96 U.S. Supreme Court order granting Supreme Court notice for certiorari [671647-1] in 93-3924, 93-3932, 94-1031. Order filed in the Supreme Court on 4/22/96 Sup. Ct. No. 95-1228 [93-3924, 93-3932, 94-1031] (lcd) [93-3924 93-3932 94-1031]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Docket No. 94-1031

UNITED STATES OF AMERICA

v.

JERRY WELLS, ET AL.

DOCKET ENTRIES

1/5/94 Criminal Case Docketed (dkm) [94-1031]

1/5/94 CERTIFIED copies of notice of cross-appeal, docket entries, 11/22/93 judgment. [385174] (dkm) [94-1031]

8/21/95 JUDGMENT: Morris S. Arnold, John R. Gibson, Michael J. Melloy: The judgment of the district court is VACATED and the case REMANDED to the District Court in accordance with the opinion. [94-1031] [607789] (mls) [94-1031]

8/31/95 MOTION of aplee, USA in 93-3924, 93-3932, 94-1031 for extension of time to file petition for rehearing enbanc until 10/5/95. [93-3924, 93-3932, 94-1031] [613631], TO COURT. w/ service 8/29/95 (lcd) [93-3924 93-3932 94-1031]

9/5/95 MOTION of aplnt, Jerry E. Wells in 93-3924, Jerry E. Wells in 94-1031 , for extension of time to file petition for rehearing by the panel until 10/5/95. [93-3924, 94-1031] [624165] w/ service 9/1/95 (lcd) [93-3924 94-1031]

10/2/95 JUDGE ORDER: granting appellee motion extend petition for rehearing time with suggestion for rehearing en banc. [631631-1] [93-3924, 93-3932, 94-1031] in 93-3924, 93-3932, 94-1031 Petition for Rehearing due on 10/5/95 in 93-3924, in 93-3932, in 94-1031 (lcd) [93-3924 93-3932 94-1031]

10/2/95 JUDGE ORDER: granting appellant motion extend petition for rehearing time [624165-1] [93-3924, 94-1031] in 93-3924, 94-1031 Petition for Rehearing due on 10/5/95 in 93-3924, in 94-1031 (lcd) [93-3924 94-1031]

10/5/95 PETITION FOR REHEARING with suggestions for rehearing en banc. Filed by Appellee USA in 93-3924, 93-3932, and 94-1031. w/ service 10/4/95. TO COURT. [93-3924, 93-3932, 94-1031] (lcd) [93-3924 93-3932 94-1031]

11/2/95 JUDGE ORDER: denying petition for Rehearing with suggestion for rehearing en banc [625722-1] filed by USA, USA, USA, USA. Petition for panel Rehearing is also denied. [93-3924, 93-3932, 94-1031] [635646] in 93-3924, 93-3932, 94-1031 (lcd) [93-3924 93-3932 94-1031]

11/20/95 MANDATE ISSUED [94-1031] (rmh) [94-1031]

2/7/96 U.S. Supreme Court notice regarding petition for writ of certiorari. Filed in the Supreme Court on 2/1/96. Supreme Ct. Case No.: 95-1228 [93-3924, 93-3932, 94-1031] [671647] (lcd) [93-3924 93-3932 94-1031]

5/2/96 U.S. Supreme Court order granting Supreme Court notice for certiorari [671647-1] in 93-3924, 93-3932, 94-1031. Order filed in the Supreme Court on 4/22/96 Sup. Ct. No. 95-1228 [93-3924, 93-3932, 94-1031] (lcd) [93-3924 93-3932 94-1031]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHWEST DIVISION

No. 93-05006-01/02-CR-SW-4

UNITED STATES OF AMERICA, PLAINTIFF

v.

JERRY E. WELLS, [DOB: 09-09-34]
and
KENNETH R. STEELE, [DOB: 02-19-34], DEFENDANTS

COUNT ONE: BOTH DEFENDANTS
18 U.S.C. 371
NMT: 5 YEARS AND $250,000
CLASS D FELONY
SUPERVISED RELEASE: NMT 3 YEARS
ORDER OF RESTITUTION

COUNTS TWO, THREE AND FOUR: BOTH DEFENDANTS
18 U.S.C. 1014 AND 2
NMT: 2 YEARS AND $250,000
CLASS E FELONY
SUPERVISED RELEASE: NMT 1 YEAR
ORDER OF RESTITUTION

COUNT FIVE: BOTH DEFENDANTS
18 U.S.C. 1014 AND 2
NMT: 20 YEARS AND $250,000
CLASS C FELONY
SUPERVISED RELEASE: NMT 3 YEARS
ORDER OF RESTITUTION

$50 SPECIAL ASSESSMENT
EACH DEFENDANT, EACH COUNT OF CONVICTION

[Filed: Feb. 11, 1993]

INDICTMENT

THE GRAND JURY CHARGES THAT:

INTRODUCTION:

At all times material to this Indictment:

1. Doss Office Systems, Inc. ("DOS"), was purchased by defendants JERRY E. WELLS and KENNETH R. STEELE on or about May 21, 1986, from Henry E. Doss of Joplin, Missouri.

2. DOS was operated by defendants JERRY E. WELLS and KENNETH R. STEELE under that name until in or about December 1988, when it was incorporated under the laws the state of Delaware and renamed "Copytech Systems, Inc." ("Copytech"). Copytech was a subsidiary of W & S Holding Company, Inc. which was wholly-owned by defendants JERRY E. WELLS and KENNETH R. STEELE and by James W. Russell.

3. Copytech was in the business of selling, leasing and servicing copier systems and business machine equipment in a four-state area consisting of Missouri, Kansas, Arkansas, and Oklahoma. Copytech's corporate headquarters were located in Joplin, in the Western District of Missouri, and it operated branch

locations in the other states employing a total of approximately 200 people.

4. Copytech's officers and their respective duties during the relevant period were as follows:

a. As Chairman and Secretary of Copytech, defendant JERRY E. WELLS handled and was involved in the financial aspects of Copytech and performed legal services for Copytech which included reviewing and approving the wording of Copytech's sales, lease and servicing contracts;

b. As President of Copytech, defendant KENNETH R. STEELE worked in Copytech's headquarters on a daily basis where he was involved in the administrative functions and operations of the corporate office and signed company checks and other documents;

c. As Vice President of Sales and Chief Executive Officer of Copytech, James W. Russell concentrated on generating sales and monitoring the sales force and was also involved in day-to-day operations and the administration of Copytech.

5. Beginning in 1986, under the management of defendants JERRY E. WELLS and KENNETH R. STEELE Copytech's copier business relied heavily on a marketing scheme the company called "Copier Management Program" ("CMP"). Under the CMP, Copytech's customers contracted to purchase a minimum number of copies per month at a fixed rate per copy. The fixed rate included the leased copier equipment, maintenance services, and supplies. The usual term of the lease contract was sixty months (5 years).

6. Customers entered into equipment leases with Copytech by signing written contracts which included formal lease agreements and schedules of

equipment and services provided under the terms of the Copier Management Program. The CMP schedules provided for ongoing maintenance services at no additional charge.

7. After a contract was made with a customer, the contract documents were sent to Copytech's headquarters in Joplin, Missouri, for further processing. Contract files were maintained in the Joplin office under the direction and control of defendants, JERRY E. WELLS and KENNETH R. STEELE and others.

8. Equity Rental Company, Inc. ("ERC") was a subsidiary of Copytech. Defendants JERRY E. WELLS and KENNETH R. STEELE established ERC to arrange and manage financing for company sales and leases of copier equipment. In that capacity, ERC acted as lessor in many of the lease contracts with Copytech's customers.

9. Defendants JERRY E. WELLS and KENNETH R. STEELE financed Copytech's operating requirements by selling, at a discounted price, Copytech's and ERC's lease contracts to banks and other financial institutions. The purchase of the contracts transferred the rights and obligations arising under each contract to the respective purchaser, often a bank. After contracts were sold, many times Copytech would continue to be the point of contact with the customer rather than the purchaser of the contract in order for Copytech to maintain its relationship with the customer.

10. In order for Copytech to secure funding from the sale of a lease contract, the banks required that Copytech do the following:

a. provide financial statements of Copytech and ERC;

b. provide copies of the lease contracts and all material information relating to the contract to be purchased in order for the bank to review the information and approve the purchase;

c. provide written agreements whereby Copytech would agree upon request by the bank to repurchase the lease contract from the bank;

d. assign to one or more of the purchasers the lease payments from the contracts;

e. if a contract was modified or amended after the sale of the contract, notify the appropriate bank of that information;

f. if a contract was renegotiated, upgraded, or cancelled after purchase by the bank, repay the outstanding contract balance to the bank; and

g. pledge the copier equipment as collateral or security for the bank in the event the customer would fail to pay the bank or fail to pay Copytech.

11. Defendants JERRY E. WELLS and KENNETH R. STEELE and their respective spouses were at times also required to sign personal guaranties in order for Copytech to sell lease contracts to certain banks. The personal guaranty was a promise by the individual to pay the bank personally if the lessee failed to perform its obligations under the terms of the contract and it also allowed the bank to pursue the assets of that guarantor in the event that the lessor defaulted on an agreement with a bank. Generally, the bank also reviewed the lessee's financial statement which was provided by Copytech.

12. From the time Copytech was purchased by defendants JERRY E. WELLS and KENNETH R. STEELE Copytech experienced financial difficulties and the Copytech operating account at First State

Bank of Joplin ("First State Bank") was regularly overdrawn. In the fall of 1989, the financial difficulties of Copytech increased and its cash flow problems became more severe. Defendants JERRY E. WELLS and KENNETH R. STEELE were each continually informed of the financial status of Copytech. Copytech ultimately ceased operations on or about May 14, 1990, citing inadequate financial resources to continue operations.

13. One funding source for Copytech was Boatmen's First National Bank of Kansas City (Boatmen's Bank-K.C.). In or about May, 1986, defendants JERRY E. WELLS and KENNETH R. STEELE contacted and caused to be contacted Boatmen's Bank-K.C. regarding the proposed sale of lease contracts. During their discussions with Boatmen's Bank-K.C., defendants JERRY E. WELLS and KENNETH R. STEELE and James W. Russell made full disclosure of the material terms and conditions of Copytech's lease contracts; that is, Boatmen's Bank-K.C. was informed that the contracts included equipment leases, copier supplies and machine servicing. Boatmen's Bank-K.C. thereafter determined that the supply/servicing aspect of the leases, that is the CMP, represented a substantial portion of the value of each lease contract. Because of the costs associated with the CMP program, Boatmen's Bank-K.C. informed the defendants, KENNETH R. STEELE and JERRY E. WELLS, that the bank would not allow Copytech the unrestricted use of the proceeds due to Copytech from the proposed sale of lease contracts.

14. Prior to purchasing any lease contracts, Boatmen's Bank-K.C. required that Copytech maintain reserve bank accounts at Boatmen's Bank-K.C.

The purpose of the reserve accounts was to reserve a portion of the proceeds obtained from Boatmen's Bank-K.C. by Copytech from the sale of the lease contracts: (a) to serve as collateral or security against any failure to pay by the lessees or customers; and (b) to serve as a source of funds for the servicing of the leased equipment pursuant to the CMP provision if Copytech failed or could not service the equipment as required during the term of the lease.

15. Ultimately, lease contracts that were purchased by Boatmen's Bank-K.C. were sold to other funding sources but the monies in the reserve accounts were released to Copytech and ERC.

16. The banks which are the subject of this Indictment are known as O'Bannon Banking Company ("O'Bannon Bank"), Buffalo, Missouri, Boatmen's National Bank of Springfield ("Boatmen's Bank-Springfield"), Springfield, Missouri; and Bank IV of Wichita, N.A. ("Bank IV"), Wichita, Kansas.

17. At all times material herein the deposits of O'Bannon Bank, Boatmen's Bank-Springfield and Bank IV were insured by the Federal Deposit Insurance Corporation ("FDIC"). The FDIC is an agency of the United States of America established to protect depositors by insuring deposits in member banks in amounts up to $100,000 per account.

18. Other financing for Copytech's operations was obtained from certain other banks located both inside and outside the State of Missouri, including Empire Bank, Springfield, Missouri; First National Bank of Dolton, Illinois; Western National Bank, Tulsa, Oklahoma; and Bank of Oklahoma, Tulsa, Oklahoma. The deposits of each of these banks were insured by the FDIC.

COUNT ONE

THE CONSPIRACY AND ITS OBJECTS

19. Beginning in or about late 1986, and continuing until on or about May 14, 1990, in the Western District of Missouri, and elsewhere, the defendants JERRY E. WELLS and KENNETH R. STEELE knowingly and intentionally conspired, combined, confederated and agreed with each other and with others known and unknown to the Grand Jury, to defraud the United States and to commit certain offenses against the United States, namely, to knowingly make and cause to be made false statements for the purpose of influencing O'Bannon Bank, Boatmen's Bank-Springfield and Bank IV, financial institutions whose accounts were insured by the FDIC, in violation of Title 18, United States Code, Section 1014 and 2.

MANNER AND MEANS

20. It was a part of the conspiracy and in furtherance of it that defendants JERRY E. WELLS and KENNETH R. STEELE agreed to finance Copytech's operations and other matters through O'Bannon Bank, Boatmen's Bank-Springfield, and Bank IV and through other outside sources. Defendants JERRY E. WELLS and KENNETH R. STEELE made and caused to be made false statements and representations and withheld information of material fact for the purpose of influencing the actions of O'Bannon Bank, Boatmen's Bank-Springfield, and Bank IV.

21. As part of and in furtherance of the conspiracy, defendants JERRY E. WELLS and KENNETH R.

STEELE, in or about late 1986 or early 1987, as a result of a meeting with representatives of Norwest Bank concerning the purchase of lease contracts, held a meeting wherein defendants JERRY E. WELLS and KENNETH R. STEELE and James W. Russell, agreed that they would withhold and conceal the fact that CMP was part of the lease contracts that banks were purchasing.

22. As part of and in furtherance of the conspiracy, defendants JERRY E. WELLS and KENNETH R. STEELE and James W. Russell and others unknown to the Grand Jury would negotiate and cause to be negotiated the sale of lease contracts. During such negotiations, defendants JERRY E. WELLS and KENNETH R. STEELE knowingly withheld and caused to be withheld from O'Bannon Bank and Bank IV, material information concerning the lease contracts, namely, that the CMP was part of the contractual obligation of lease contracts that the banks would be purchasing.

23. As part of and in furtherance of the conspiracy, defendants JERRY E. WELLS and KENNETH R. STEELE forged and caused to be forged documents submitted to O'Bannon Bank for the purpose of influencing the bank, that is, the signatures of the defendants' spouses on the unconditional personal guaranties were forged by defendants JERRY E. WELLS and KENNETH R. STEELE and submitted to O'Bannon Bank.

24. As part of and in furtherance of the conspiracy, defendants JERRY E. WELLS and KENNETH R. STEELE withheld material information from the banks by "double pledging" collateral (the leased equipment) and "double funding" contracts without the knowledge, approval, and authorization of

O'Bannon Bank in that they sold, caused to be sold and attempted to sell contracts previously purchased by O'Bannon Bank to other purchasers without informing O'Bannon Bank, thereby causing O'Bannon Bank to delay the exercise of its option to demand repurchase of the lease contracts purchased from Copytech and ERC.

25. As part of and in furtherance of the conspiracy, defendants JERRY E. WELLS and KENNETH R. STEELE would be notified that a lease contract which had already been purchased by Boatmen's Bank-Springfield was, in reality, a "dead deal", that is, a transaction in which a lease contract between the customer and Copytech or ERC was either cancelled, invalid, or had never been in existence. Despite knowledge of that fact, defendants JERRY E. WELLS and KENNETH R. STEELE would conspire to withhold and cause to be withheld from Boatmen's Bank-Springfield material information that the contract or agreement was either cancelled, invalid, or had never been in existence, for the purpose of influencing the actions of Boatmen's Bank-Springfield, thereby causing Boatmen's Bank-Springfield to delay the exercise of its option to demand repurchase of the lease contracts purchased from Copytech and ERC.

26. As part of and in furtherance of the conspiracy, defendants JERRY E. WELLS and KENNETH R. STEELE for the purpose of influencing the actions of the banks, would fail to provide to O'Bannon Bank and Bank IV complete lease contract files, when in truth and fact, defendants JERRY E. WELLS and KENNETH R. STEELE well knew the documentation submitted to those financial institutions was

incomplete and inaccurate and materially affected Copytech's and ERC's agreements with the banks.

27. On or about January 25, 1988, the accounting firm of Arthur Young & Co. prepared financial statements and issued an auditor's report for the benefit of and at the request of Copytech. A purpose for the preparation of the 1987 financial statements and the auditor's report was to assist Copytech in obtaining financing from the banks since financial statements were required by the banks. On or about April 6, 1989, defendant JERRY E. WELLS was informed that the "auditor's report issued by Arthur Young & Company dated January 25, 1988 must no longer be relied upon or be associated with the combined balance sheet of Doss Office Systems/Equity Rental Company, Inc. and the related statements of income and retained earnings and changes in financial position for the year ended . . ." Defendant JERRY E. WELLS was requested "to immediately notify the Bank of Oklahoma and all other recipients of such 1987 financial statements and related auditor's report, that they should not be relied upon . . ."

28. As part of and in furtherance of the conspiracy, despite the request by Arthur Young & Co., defendants JERRY E. WELLS and KENNETH R. STEELE failed to notify O'Bannon Bank, Boatmen's Bank-Springfield and Bank IV that the 1987 financial statements of Copytech and ERC and related auditor's report was incorrect and inaccurate and could no longer be relied on, for the purpose of influencing the actions of O'Bannon Bank, Boatmen's Bank-Springfield and Bank IV.

OVERT ACTS

29. In furtherance of the conspiracy, and in order to effect its objects, the following overt acts were committed in the Western District of Missouri and elsewhere:

a. On or about March 28, 1989, defendants JERRY E. WELLS and KENNETH R. STEELE and others caused to be submitted to O'Bannon Bank the unconditional personal guaranties of their spouses in order to influence the actions of O'Bannon Bank in connection with the purchase of lease contracts from Copytech and ERC when defendants JERRY E. WELLS and KENNETH R. STEELE knew, in truth and fact, that the guaranties of their spouses were forged by defendants JERRY E. WELLS and KENNETH R. STEELE and, therefore were unenforceable;

b. On or about June 3, 1989, defendants JERRY E. WELLS and KENNETH R. STEELE and others, without the prior authorization, approval and knowledge of O'Bannon Bank, sold and caused to be sold the John Zink Company lease contract which had previously been purchased by O'Bannon Bank on or about April 17, 1989, causing such contract to be "double funded", that is, the John Zink contract was sold to both O'Bannon Bank and to First National Bank of Dolton, Illinois. Defendants JERRY E. WELLS and KENNETH R. STEELE and others fraudulently failed to inform O'Bannon Bank of the sale, in order to influence the actions of the bank;

c. On or about July 7, 1989, defendants JERRY E. WELLS and KENNETH R. STEELE aiding and abetting each other and others known to the Grand Jury, knowingly made and caused to be made false

statements of material fact to Bank IV, for the purpose of influencing said bank, in that defendants JERRY E. WELLS and KENNETH R. STEELE caused the 1987 financial statements of Copytech and ERC and related auditor's report to be prepared and issued by Arthur Young & Co., in the Western District of Missouri, and thereafter submitted the 1987 financial statements of Copytech and ERC and related auditor's report and caused them to be submitted to Bank IV, in order to influence the actions of Bank IV, when in truth and fact, as defendants JERRY E. WELLS and KENNETH R. STEELE well knew, the 1987 financial statements of Copytech and ERC and related auditor's report were incorrect and inaccurate and could not be relied upon.

d. On or about July 7, 1989, defendants JERRY E. WELLS and KENNETH R. STEELE aiding and abetting each other and others known to the Grand Jury, knowingly made and caused to be made false statements of material fact to Bank IV, for the purpose of influencing said bank, in that defendants JERRY E. WELLS and KENNETH R. STEELE caused to be provided to Bank IV approximately 17 lease contracts which falsely stated that maintenance was the responsibility of the lessee. Defendants JERRY E. WELLS and KENNETH R. STEELE failed to provide material portions of the lease contracts to Bank IV, that is, the relevant CMP schedules, in order to influence the actions of Bank IV, when in truth and fact, as defendants JERRY E. WELLS and KENNETH R. STEELE well knew, maintenance on the copier equipment performed pursuant to the CMP schedule was a material part of the contracts that Bank IV purchased.

e. On or about September 20, 1989, defendant KENNETH R. STEELE received notice by memorandum prepared by an employee of Copytech that Copytech had too many "deals go dead". Despite knowledge of that fact, defendants JERRY E. WELLS and KENNETH R. STEELE withheld and caused to be withheld from Boatmen's Bank-Springfield that lease contracts purchased by Boatmen's Bank-Springfield from Copytech and ERC were cancelled, invalid, and not in existence, for the purpose of influencing the actions of Boatmen's Bank-Springfield.

30. The Grand Jury incorporates by reference the allegations in Counts Two, Three, Four and Five of this Indictment as overt acts in furtherance of the conspiracy.

31. As a result of defendants KENNETH R. STEELE's and JERRY E. WELLS' conspiracy to make false statements, O'Bannon Bank suffered losses of approximately $620,000; Boatmen's Bank-Springfield suffered losses of approximately $2,414,800; and Bank IV suffered losses of approximately $587,000.

All in violation of Title 18, United States Code, Section 371.

COUNT TWO

1. The Grand Jury hereby incorporates and realleges each and every allegation contained in paragraphs 1 through 18 of the Introduction of this Indictment.

2. On or about March 28, 1989, at Buffalo, in the Western District of Missouri and elsewhere, defendants JERRY E. WELLS and KENNETH R. STEELE knowingly made and caused to be made false

statements of material fact to O'Bannon Bank, an institution whose deposits were then insured by the FDIC, for the purpose of influencing said bank, in that defendants JERRY E. WELLS and KENNETH R. STEELE submitted and caused to be submitted to O'Bannon Bank unconditional personal guaranties bearing the signatures of Janice C. Steele and Kay Wells in order to influence the actions of O'Bannon Bank concerning the purchase of lease contracts from Copytech and ERC, and at the time the personal guaranties were submitted to O'Bannon Bank, defendants JERRY E. WELLS and KENNETH R. STEELE knew full well that they had forged the signatures of their spouses Janice C. Steele and Kay Wells on the unconditional personal guaranties.

All in violation of Title 18, United States Code, Sections 1014 and 2.

COUNT THREE

1. The Grand Jury hereby incorporated and realleges each and every allegation contained in paragraph 1 through 18 of the Introduction of this Indictment.

2. On or about July 7, 1989, at Joplin, in the Western District of Missouri and elsewhere, defendants JERRY E. WELLS and KENNETH R. STEELE aiding and abetting each other and others known to the Grand Jury, knowingly made and caused to be made false statements of material fact to and withheld information of material fact from Bank IV, an institution whose deposits were then insured by the FDIC, for the purpose of influencing said bank, in that defendants JERRY E. WELLS and KENNETH R. STEELE caused the 1987 financial statements of Copytech and ERC and related auditor's report to be

prepared and issued by Arthur Young & Co., in the Western District of Missouri, and thereafter submitted the 1987 financial statements of Copytech and ERC and related auditor's report and caused them to be submitted to Bank IV, in order to influence the actions of Bank IV, when in truth and fact, as defendants JERRY E. WELLS and KENNETH R. STEELE well knew, the 1987 financial statements of Copytech and ERC and related auditor's report was incorrect and inaccurate and could not be relied upon and defendants JERRY E. WELLS and KENNETH R. STEELE failed to advise Bank IV of this fact.

All in violation of Title 18, United States Code, Sections 1014 and 2.

COUNT FOUR

1. The Grand Jury hereby incorporates and realleges each and every allegation contained in paragraphs 1 through 18 of the Introduction of this Indictment.

2. On or about July 7, 1989, at Joplin, in the Western District of Missouri and elsewhere, defendants JERRY E. WELLS and KENNETH R. STEELE aiding and abetting each other and others known to the Grand Jury, knowingly made and caused to be made false statements of material fact to and withheld information of material fact from Bank IV, an institution whose deposits were then insured by the FDIC, for the purpose of influencing said bank, in that defendants JERRY E. WELLS and KENNETH R. STEELE caused to be provided to Bank IV approximately 17 lease contracts which falsely stated that maintenance was the responsibility of the lessee (customer). Despite knowledge of that fact, defendants JERRY E. WELLS and KENNETH R.

STEELE failed to provide material portions of the lease contracts to Bank IV, that is, the relevant CMP schedules, in order to influence the actions of Bank IV, when in truth and fact, as defendants JERRY E. WELLS and KENNETH R. STEELE well knew, maintenance on the copier equipment performed pursuant to the CMP schedule was a material part of the contracts that Bank IV purchased.

All in violation of Title 18, United States Code, Sections 1014 and 2.

COUNT FIVE

1. The Grand Jury hereby incorporates and realleges each and every allegation contained in paragraphs 1 through 18 of the Introduction of this Indictment.

2. On or about September 20, 1989, at Joplin, in the Western District of Missouri and elsewhere, defendants JERRY E. WELLS and KENNETH R. STEELE aiding and abetting each other and others known to the Grand Jury, knowingly made and caused to be made false statements of material fact to and withheld information of material fact from Boatmen's Bank-Springfield, an institution whose deposits were then insured by the FDIC, for the purpose of influencing said bank, in that defendant KENNETH R. STEELE received notice by memorandum prepared by an employee of Copytech that Copytech had too many "deals go dead". Thereafter, an employee prepared a list of "DEAD DEALS" for defendant JERRY E. WELLS which included the Strafford RVI School lease contract. Despite knowledge of that fact, defendants JERRY E. WELLS and KENNETH R. STEELE withheld and caused to be withheld from Boatmen's Bank-Springfield that the Strafford RVI

School lease contract purchased by Boatmen's Bank-Springfield from Copytech and ERC was cancelled, invalid, and not in existence, for the purpose of influencing the actions of Boatmen's Bank-Springfield, depriving Boatmen's Bank-Springfield its right to demand Copytech and ERC repurchase the Strafford RVI School lease contract.

All in violation of Title 18, United States Code, Sections 1014 and 2.

A TRUE BILL

/s/ JOYCE HUMBES
FOREPERSON OF THE GRAND JURY

/s/ MARK C. THOMPSON
MARK C. THOMPSON #38606
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHWESTERN DIVISION

No. 93-05006-01/02-CR-SW-4

UNITED STATES OF AMERICA, PLAINTIFF

v.

JERRY E. WELLS AND KENNETH R. STEELE,
DEFENDANTS

Springfield, Mo.
Wednesday, July 21, 1993

VOLUME VIII
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RUSSELL G. CLARK,
UNITED STATES DISTRICT JUDGE, AND A JURY

* * *

[1744] THE COURT: All right. Following the conferences on instructions, the Court has indicated it will give instructions numbered 1 through 26. Instructions 1 through 7 were given at the commencement of the trial; they were tendered by the government, and there was no objection.

Instructions 24 and 25 have been submitted [1745] by Defendant Steele and Instruction 23 was submitted by Defendant Wells.

Instructions 21 and 23 were submitted by both defendants. All the balance of the instructions were submitted by the United States government.

Now, the defendants have offered instructions which the Court numbered A through E, inclusive, which are being refused by the Court; in addition, Instruction No. F, which is tendered by the government, is being refused.

THE COURT: Mr. Thompson, do you wish to make any record on behalf of the government concerning these instructions?

MR. THOMPSON: Your Honor, other than the instructions you have accepted, the United States has no objections.

THE COURT: Mr. Wyrsch.

MR. WYRSCH: Your Honor, we would object to Instructions 15, 18 and 20 on the basis they submitted to the jury a theory that the defendants could be found guilty on failing to disclose or for concealment of material facts. We do not believe that is a viable theory under Section 1014 or under Count 1, the conspiracy, and we respectfully object to those instructions in that regard.

We would object, of course, to the Court not [1746] giving A through E. That's enough said on that matter.

We would object to giving of any of the instructions based on insufficiency of evidence.

We would object—and, in accordance with our motion for judgment of acquittal at the close of all the evidence and the close of the government's case, we would object to the giving of instructions in that the government's proof in this case would show more than one conspiracy and otherwise constitutes a variance or constructive amendment of the indictment.

We would object with respect to the matter of materiality not being submitted to the jury, and we made a record on that which we would respectfully incorporate into our remarks, but ask permission of the Court, with respect to these objections, that they would be the same objections that we would make at the end of the Court's reading the instructions so you won't have to repeat them again, if that's satisfactory with the Court. I think the rule requires that we do that unless we ask permission from the Court to — —

THE COURT: Mr. Bradshaw.

MR. BRADSHAW: Your Honor, on behalf of Defendant Kenneth Steele, I join in and adopt Mr. Wyrsch's objections. We object to any of the instructions tendered by Defendant Steele which have been refused by the Court.

[1747] We believe that there has been a fatal variance between the indictment alleged in Count— the con-spiracy alleged in Count 1 of the indictment and the government's evidence; and we believe that the Court's effort to cure that situation by giving the conspiracy instructions still allows a fatal variance to exist so that the conspiracy being submitted to the jury for its consideration is not the conspiracy alleged in the indictment, and that specifically we object to all of those conspiracy instructions which we think are Instructions Nos. 13, and 15 through 19.

INSTRUCTION NO. 13

The charges in this case are as follows:

Under Count One, the indictment charges that defendants Jerry E. Wells and Kenneth R. Steele committed the crime of conspiracy to make false statements to financial institutions in violation of 18 U.S.C. §§ 371, 1014, and 2.

Under Count Two, the indictment charges that defendants Jerry E. Wells and Kenneth R. Steele committed the crime of knowingly making and causing to be made false statements of material facts to O'Bannon Bank by submitting to O'Bannon Bank the unconditional personal guaranties bearing the signatures of Janice C. Steele and Kay Wells in order to influence the actions of O'Bannon Bank concerning the purchase of lease contracts from Copytech and ERC, and at the time the personal guaranties were submitted to the O'Bannon Bank, the defendants knew full and well that they had forged the signatures of their spouses Janice C. Steele and Kay Wells on the unconditional personal guaranties in violation of 18 U.S.C. §§ 1014 and 2. Each defendant has pleaded not guilty to each crime with which he is charged.

As I told you at the beginning of trial, an indictment is simply an accusation. It is not evidence of anything. To the contrary, each defendant is presumed to be innocent. Thus each defendant, even though charged, begins the trial with no evidence against him. So the presumption of innocence alone is sufficient to find the defendant not guilty and can be overcome only if the government proves, beyond a

reasonable doubt, each essential element of the crime charged.

Keep in mind that you must give separate consideration to the evidence about each individual defendant. Each defendant is entitled to be treated separately, and you must return a separate verdict for each defendant. Also keep in mind that you must consider, separately, each crime charged against each individual defendant, and must return a separate verdict for each of those crimes charged.

INSTRUCTION NO. 15

The crime of conspiracy as charged in Count One of the indictment, has four essential elements, which are:

One, beginning in late 1986, two or more persons reached an agreement or came to an understanding to make false statements to financial institutions in order to influence their decisions in the purchase of lease contracts by making the causing to be made false statements and representations and withholding and concealing information of material fact for the purpose of influencing the actions of the financial institutions;

Two, the defendant voluntarily and intentionally joined in the agreement or understanding, either at the time it was first reached or at some later time while it was still in effect;

Three, at the time the defendant joined in the agreement or understanding, he knew the purpose of the agreement or understanding; and

Four, while the agreement or understanding was in effect, a person or persons who had joined in the

agreement knowingly did one or more of the following acts:

a. On or about March 28, 1989, defendants Jerry E. Wells and Kenneth R. Steele and others caused to be submitted to O'Bannon Bank the unconditional personal guaranties of their spouses in order to influence the actions of O'Bannon Bank in connection with the purchase of lease contracts from Copytech and ERC when defendants Jerry E. Wells and Kenneth R. Steele knew, in truth and fact, the signatures of their spouses were forged by defendants Jerry E. Wells and Kenneth R. Steele and, therefore were unenforceable.

b. In accordance with the conspiracy agreement made in 1986, beginning in or about February 1989, defendants Jerry E. Wells and Kenneth R. Steele made and caused to be made false statements of material fact to O'Bannon Bank, for the purpose of influencing the bank, in that defendants Jerry E. Wells and Kenneth R. Steele caused to be provided to O'Bannon Bank lease contracts which falsely stated that maintenance was the responsibility of the lessee. Defendants Jerry E. Wells and Kenneth R. Steele failed to provide material portions of the lease contracts to O'Bannon Bank, that is, the relevant CMP schedules in order to influence the actions of O'Bannon Bank, when in truth and fact as defendants Jerry E. Wells and Kenneth R. Steele well knew, maintenance on the copier equipment performed pursuant to the CMP schedules was a material part of the contracts O'Bannon Bank purchased.

c. In accordance with the conspiracy agreement made in 1986 James Russell knowingly made and caused to be made false statements of material fact to Bank IV, for the purpose of influencing the bank, in

that James Russell caused to be provided to Bank IV eighteen (18) lease contracts which falsely stated that maintenance was the responsibility of the lessee. James Russell failed to provide material portions of the lease contracts to Bank IV, that is, the relevant CMP schedules, in order to influence the actions of Bank IV, when in truth and fact, as James Russell and defendants Jerry E. Wells and Kenneth R. Steele well knew, maintenance on the copier equipment performed pursuant to the CMP schedule was a material part of the contracts that Bank IV purchased.

For you to find a defendant guilty of this crime the government must prove all of these elements beyond a reasonable doubt as to that defendant; otherwise you must find that defendant not guilty.

INSTRUCTION NO. 18

To assist you in determining whether there was an agreement or understanding to make false statements to banks, you are advised that the elements of making a false statement to a bank are:

One, that the bank was federally insured;

Two, that the defendant made or caused to be made a false statement to the bank knowing that it was false, or withheld information of material fact from the bank; and

Three, that the defendant did so for the purpose of convincing the bank to purchase lease contracts.

Count One of the indictment charges the defendants Jerry E. Wells and Kenneth R. Steele and others who are not presently defendants in this case with the charge of conspiracy to make false statements to O'Bannon Bank and Bank IV. In these

instructions I define the elements of making a false statement to a bank in relation to the charges that the defendants made false statements to a bank. You may use these definitions in considering whether the defendants conspired to make false statements to the banks, keeping in mind that the charges in Count One charge a conspiracy to make false statements and not that the crime of making a false statement was committed.

INSTRUCTION NO. 20

The crime of making a false statement to a bank as charged in Count Two of the Indictment has three essential elements which are:

First: That O'Bannon Bank was federally insured;

Second: That the defendant knowingly made or caused to be made a false statement to the bank, that is, by submitting the forged unconditional personal guaranties of their spouses;

Third: That the defendants did so for the purpose of convincing the bank to purchase lease contracts.

It is not necessary, however, to prove that the institution involved was, in fact, influenced or misled. What must be proven is that the defendant intended to influence the bank by the false statement.

A statement or representation is "false" when it is untrue when made or effectively conceals a material fact. A material fact is a fact that would be important to a reasonable person in deciding whether to engage or not to engage in a particular transaction.

An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake or accident. The government is not required to prove that the defendant knew that his acts or omissions

were unlawful. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

The materiality of the statement or representation alleged to be false or concealed is not a matter with which you are concerned and should not be considered by you in determining the guilt or innocence of the defendant.

To make a false statement to a federally insured bank, the defendant need not directly submit the false statement to the institution. It is sufficient if the defendant submits the statement to a third party knowing that the third party will submit the false statement to the federally insured bank.

For you to find a defendant guilty of the crime charged under Count Two, the government must prove all of the essential elements beyond a reasonable doubt as to that defendant; otherwise you must find that particular defendant not guilty of this crime under Count Two.

INSTRUCTION NO. 21

One of the issues in this case is whether the defendants acted in good faith. Good faith is a complete defense to the charge of making a material false statement to a bank and conspiracy to make material false statements to a bank because good faith on the part of the defendants is, simply, inconsistent with the intent to deceive as alleged in the charges.

A person who acts or causes another person to act on a belief or an opinion held is not punishable under the statute merely because the belief or opinion turns out to be incorrect; inaccurate or wrong. An honest

mistake in judgment or an error in management does not rise to the level of an intent to deceive.

While the term "good faith" has no precise definition, it means, among other things, a belief or opinion honestly held, a literally true statement, and an absence of malice or ill will.

Evidence that the defendants acted in good faith may be considered by you, together with all other evidence, in determining whether or not the defendants acted with the mental state required by statute, *e.g.*, with the intent to deceive.

INSTRUCTION NO. 22

The government must prove beyond a reasonable doubt that defendants did not reasonably believe they had the authority of their wives to sign guarantees submitted to O'Bannon Bank. If you find that the defendants reasonably believed they were authorized to sign their wives' signatures on the guaranty agreements, then you must find that the defendants did not have the specific intent to commit the offense of making a material false statement for purposes of influencing O'Bannon Bank.

INSTRUCTION NO. 23

The government must prove beyond a reasonable doubt each and every element of the offenses charged in the Indictment against Defendant Jerry E. Wells. If the government fails to meet its burden, you must acquit Defendant Wells.

Defendant Wells's theory of the case is as follows:

COUNT I

Defendant Wells contends and has presented evidence that he never entered into any agreement or conspiracy with anyone to make material false statements for the purpose of influencing O'Bannon Bank and Bank IV. Specifically,

(1) Defendant Wells had no intent to make material false statements and did not make material false statements because CMP was disclosed to O'Bannon Bank and Bank IV by Jim Russell and others. Further, that financial statements, which described CMP, were provided to the banks, and that other information regarding CMP was reasonably available to the banks named in Count I;

(2) Defendant Wells, in good faith, believed the statement was literally true, that CMP was not a contractual obligation of the lease contracts, purchased by the banks alleged in the Indictment;

(3) Defendant Wells, in good faith, believed that complete lease contract files were provided by Copytech to O'Bannon Bank and Bank IV, and that he neither directed any employee of Copytech what documents to supply to Bank IV and O'Bannon Bank from the lease files nor directed any employee, or any other person, to withhold information from Bank IV or O'Bannon Bank;

(4) Defendant Wells reasonably believed, in good faith, that he had his wife, Kay's, authority to sign her name to the personal guarantee submitted to O'Bannon Bank;

For you to find Defendant Wells guilty of Count I of the Indictment, the government must prove beyond a reasonable doubt all the essential elements of the crime charged in Count I as to Defendant Wells, and must prove beyond a reasonable doubt that Defendant Wells was not acting in good faith. If the government fails to meet it burden of proof in Count I, you must acquit Defendant Jerry E. Wells.

COUNT II

Defendant Wells Contends and presented evidence that he did not knowingly make a material false statement to O'Bannon. Specifically,

(1) Defendant Wells reasonably believed, in good faith, that he had his wife's authority to sign her name to the personal guarantee submitted to O'Bannon Bank.

For you to find Defendant Wells guilty of Count II of the Indictment, the government must prove beyond a reasonable doubt all the essential elements of the crime charged in Count II as to Defendant Wells, and must prove beyond a reasonable doubt that Defendant Wells was not acting in good faith. If the government fails to meet its burden of proof in Count II, you must acquit Defendant Jerry E. Wells.

INSTRUCTION NO. 24

The government must prove beyond a reasonable doubt each and every element of the offenses charged in the Indictment against Defendant Kenneth R. Steele. If the government fails to meet its burden, you must acquit Defendant Steele.

Defendant Steele's theory of the case is as follows:

COUNT ONE

Defendant Steele contends and has presented evidence with respect to Count One that he never entered into any agreement or conspiracy with anyone to make false statements for the purpose of influencing O'Bannon Bank or Bank IV; that, on the contrary:

(1) He believed that the fact that CMP was paid for by some lessees in their monthly payment was disclosed to all financial institutions and that such information was reasonably available to such financial institutions;

(2) He does not believe that he forged or submitted his wife's forged personal guarantees to O'Bannon Bank on March 28, 1989; and if he signed his wife's signature to her any such personal guarantee, he reasonably believed, in good faith, that he was authorized by his wife, Janice, to sign her name to personal guarantees including the personal guarantees submitted to O'Bannon Bank on March 28, 1989;

(3) Ken Steele reasonably believed complete lease contract files were provided by CopyTech to O'Bannon Bank and Bank IV and he was not involved in directing Barb Kirk Cox or any CopyTech employee what documents to supply O'Bannon and Bank IV from the lease files;

For you to find Defendant Steele guilty of Count I of the Indictment, the government must prove beyond a reasonable doubt all the essential elements of the crimes charged in Count I as to Defendant Steele, and must prove beyond a reasonable doubt that Defendant Steele was not acting in good faith. If the government

fails to meet its burden of proof in Count I, you must acquit Defendant Kenneth R. Steele.

COUNT TWO

Defendant Steele contends and has presented evidence with respect to Count Two that he did not submit his wife's forged personal guarantee to O'Bannon Bank on March 28, 1989; and if he signed his wife's name to any such personal guarantee, he reasonably believed, in good faith, that he was authorized by his wife, Janice Steele, to sign her name to personal guarantees including the personal guarantee submitted to O'Bannon Bank on March 28, 1989.

For you to find the Defendant Steele guilty of Count II of the Indictment, the government must prove beyond a reasonable doubt all the essential elements of the crime charged in Count II as to Defendant Steele, and must prove beyond a reasonable doubt that Defendant Steele was not acting in good faith. If the government fails to meet its burden of proof in Count II, you must acquit Defendant Kenneth R. Steele.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Appeal No. 94-1031-WM
Cross-Appeal No. 93-3924-WM
and No. 93-3932-WM

UNITED STATES OF AMERICA,
APPELLEE/CROSS-APPELLANT

v.

JERRY E. WELLS
AND
KENNETH R. STEELE,
APPELLANTS/CROSS-APPELLEES

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHWESTERN DIVISION

BRIEF FOR APPELLEE/CROSS-APPELLANT

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* * * * *

Materiality of the CMP Schedule

[28] Defendants next argue that the Government failed to prove beyond a reasonable doubt that the CMP addendum was material as a matter of law, i.e., capable to influencing the purchase of the lease agreements by O'Bannon Bank and Bank IV, because the lease had no false statement and the CMP addendum was a separate agreement.

[29] The officers of three banks testified that the CMP agreement between the lessee and lessor was material in that it had the capacity to influence their decision to buy leases. Tr. 658, 882, 923, 964. Officers of Bank IV and O'Bannon Bank testified that the banks would not have bought the leases had they known of the CMP obligations of the lessor. Tr. 658, 923. This is clearly enough evidence for the court to find materiality.

The defendants also claim that they should have been permitted to present expert witness as to the materiality issue.[52] The Eighth Circuit has held the issue of materiality in false statements charges brought under 18 U.S.C. § 1014 is a question of law for the trial court to decide and it is proper for the court to inform the jury that the allegedly false statements have been found to be material as a matter of law. *United States v. Ribaste*, 905 F.2d 1140, 1143 (8th Cir. 1990). The testimony was presented to the trial court

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[52] The defendants cite *United States v. Lueben*, 816 F.2d 1032, 1033 (5th Cir. 1987) on this point. However, that case is distinguishable from these facts because the district court in that case did not allow the expert to make a proffer on the issue of materiality. That was not the situation here. Tr. 1064-1083.

and the court rejected it. The court found the lease agreements and the guaranty agreements material. Tr. 1737. The evidence adduced at trial clearly supports the court's finding that the CMP addendum and the personal guaranties were material. The defendants' appeal fails with respect to this argument. Therefore, the Court should uphold the conviction on Count I.

* * * * *

[32]

II. THE COURT PROPERLY DENIED DEFENDANTS' MOTIONS FOR JUDGMENT OF ACQUITTAL ON COUNT I BECAUSE IT ALLEGED AND PROVED A VIOLATION OF 18 U.S.C. § 1014 AS A MATTER OF LAW.

The defendants claim that the failure to provide the CMP addenda was not an affirmative act or misrepresentation, that 18 U.S.C. § 1014 requires an affirmative act or misrepresentation be made, and therefore the defendants could not have violated the statute or been convicted under Count I. Count I charges the defendants with conspiring to make false statements to banks knowing the statements to be false and withholding information of material fact from the banks. Ap. 35-42. A statement or representation is "false" when it is untrue when made or when it effectively conceals a material fact. *See, e.g., United States v. Haddock*, 956 F.2d 1534, 1551 (10th Cir.), cert. denied, ___ U.S. ___, 113 S. Ct. 88 (1992).

The purpose of Section 1014 is to protect authorized functions of specified institutions from "deceptive practices." *United States* [33] v. *Gilliland*, 312 U.S. 86, 93 (1941); *Kovens v. United States*, 338 F.2d 611, 616 (5th Cir. 1964), *cert. denied*, 380 U.S. 976 (1965).

The courts have repeatedly rejected restrictive constructions of the statute, deeming it designed to protect against a broad variety of schemes that may influence a bank "in any way." *See, e.g., United States v. Payne*, 602 F.2d 1215, 1219 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980). "Section 1014 'is not merely directed to false statements which are actually used in the decision to make a loan. *It requires that all statements supplied to lending institutions . . . , which have the capacity to influence them, be accurate or at least not knowingly false . . .*'" *United States v. Kindig*, 854 F.2d 703, 706 (5th Cir. 1988), *quoting United States v. Goberman*, 458 F.2d 226, 229 (3d Cir. 1972) (emphasis in original).

Concealing material information from a bank for the purpose of influencing it is a crime under 18 U.S.C. § 1014. Like § 1014, in 18 U.S.C. § 1005 (making false entries, reports or statements to financial institutions with intent to defraud) the term "conceal" or "omit" does not appear in the language of the statute. Nevertheless, the Eighth Circuit found that omission in a § 1005 prosecution can be a "false entry" where an honest entry would otherwise be made. *See United States v. Copple*, 827 F.2d 1182, 1187 (8th Cir. 1987), *cert. denied*, 484 U.S. 1073 (1988).

Obviously, failing to disclose or concealing material information from a bank can result in an affirmative assertion, misrepresentation or false statement under § 1014.[55] Courts have broadly interpreted the

[55] The defendants cite *Williams v. United States*, 458 U.S. 279, (1982) for the proposition that false statements which may support a conviction under 18 U.S.C. § 1014 must be an affirmative assertion of a factual statement. The *Williams* case involves the writing of a bad check and specifically finds that checks are not factual statements. Most courts have declined to read *Williams* broadly to require the reversal of convictions in situations other than those involving insufficient-funds checks. *See, e.g., United States v. Hord*, 6 F.3d 276, 286 (5th Cir. 1993); *United States v. Falcone*, 934 F.2d 1528 (11th Cir. 1991), *cert denied*, ___ U.S. ____, 113 S. Ct. 292 (1992); *United States v. Bonnett*, 877 F.2d 1450 (10th Cir. 1989); *United States v. Worthington*, 822 F.2d 315, 319 (2d Cir.), *cert. denied*, 484 U.S. 944 (1987); *United States v. Price*, 763 F.2d 640 (4th Cir. 1985).

section to cover various types of acts and misrepresentations as statements. *See, e.g., United States v. Haddock*, 956 F.2d 1534 (10th Cir. 1992) (evidence that defendant failed to disclose line of credit sufficient to convict under § 1014); *United States v. Trexler*, 474 F.2d 369, 370-71 (5th Cir.), *cert. denied*, 412 U.S. 929 (1973) (in a § 1014 prosecution, the jury could consider what "a defendant does or fails to do", it is not limited to affirmative acts); *United States v. Sackett*, 598 F.2d 739, 740-42 (2d Cir. 1979) (in § 1014 prosecution, there was sufficient evidence for the jury to convict for omitting information orally on loan application); *United States v. Trice*, 823 F.2d 80 (5th Cir. 1987) (failure to disclose material information needed to avoid deception in connection with loan transactions covered by § 1014 constitutes a false statement or report within the meaning of the statute and thus violates the statute); *United States v. Ryan*, 828 F.2d 1010, 1017 (3d Cir. 1987) (fact that a word was not spoken or written does not necessarily mean that a message was not [35] sent and received; under § 1014 a statement includes assertive "nonverbal conduct"); *United States v. Concemi*, 957 F.2d 942, 959-61 (1st Cir. 1992) (HUD-1 certificates which omit information about second mortgage constitute "statement" for § 1014 purposes).

Likewise, concealing the existence of the CMP addendum was sufficient to constitute a false statement in light of the language in the related lease contract. Initially, when the defendants disclosed CMP to a bank, the bank either required an escrow account or did not purchase any leases. Thereafter, the defendants agreed to conceal the "soft costs" (CMP addendum). Based on Russell's testimony, there is no question that the defendants agreed and intended to make false statements to financial institutions. The testimony at trial revealed Wells deleted all reference to CMP from the CSI lease contracts and created a separate addendum which was never provided to banks. If the CMP addenda had been provided to the banks, it would have been clear to the banks that service of the equipment was truly the *lessor's* responsibility and the lease agreement was, in fact, *not* the only agreement. Withholding the CMP schedules concealed a material fact, and the lease contracts as provided to the banks provided false information and were misleading. Clearly, the trial court properly denied the defendants' motions for judgment of acquittal as to Count I because the charged offense constituted a violation of 18 U.S.C. §§ 371 and 1014.

* * * * *

[41]

VI. THE EVIDENCE PRESENTED AT TRIAL TOGETHER WITH ALL REASONABLE INFERENCES FAVORABLE TO THE GOVERNMENT WAS SUFFICIENT AS A MATTER OF LAW TO SUPPORT A GUILTY VERDICT ON COUNT II.

The defendants were convicted under Count II of knowingly submitting forged guaranties of their spouses to O'Bannon Bank in violation of 18 U.S.C. § 1014. The defendants assert that the Government failed to prove beyond a reasonable doubt the elements of the offense of making a false statement to a bank, specifically, the intent and materiality elements. When reviewing for sufficiency of the evidence, the evidence is viewed in the light most favorable to the verdict and accept as established all reasonable [42] inferences supporting the verdict are accepted as established. *United States v. Rodriguez*, 812 F.2d at 416; *United States v. Plenty Arrows*, 946 F.2d 62, 64 (8th Cir. 1991). The verdict is upheld if there is substantial evidence to justify an inference of guilt and is overturned only if the evidence is such that a reasonable juror *must* have a reasonable doubt as to the existence of one of the essential elements of the crime. *United States v. Penn*, 974 F.2d 1026, 1028 (8th Cir. 1992).

Intent

The defendants suggest that the Government did not prove beyond a reasonable doubt that the defendants did not have authority, or a reasonable, good faith belief that they had authority, to sign their spouses' signatures on the O'Bannon Bank personal guaran-

ties.[63] However, the Government introduced evidence concerning the defendants' lack of authority to sign the guaranties on behalf of their wives. The defendants simply refuse to accept that the jury rejected their testimony.

The issue of intent is particularly within the province of the jury and its function is to weigh the evidence, draw reasonable inferences therefrom, and evaluate witness credibility. *United* [43] *States v. Whitman*, 665 F.2d 313, 318 (10th Cir. 1981). Witness credibility is a question of fact for the jury. *United States v. Big Crow*, 898 F.2d 1326, 1329 (8th Cir. 1990). Proof of intent through use of circumstantial evidence is not unusual. *See, e.g., United States v. Miller*, 573 F.2d 388, 391 (7th Cir. 1978).

The evidence at trial revealed the three owners met alone in Russell's office at CSI to sign the guaranties. Tr. 185. Russell warned Wells and Steele that he was sure that his wife would not sign the guaranty. Tr. 185. Wells knew that O'Bannon required the guaranties to be signed by both husbands and wives. Tr. 185, 1190, 1322. However, Wells informed Russell he should sign for his wife because if he were later sued, the bank could not claim their

[63] The defendants cite *United States v. West*, 666 F.2d 16 (2d Cir. 1981) in support of their argument. In the *West* case, the court failed to submit an instruction which dealt with the issue of the Government proving beyond a reasonable doubt that the defendant did not reasonably believe he had authority from his wife to sign. Unlike that case, the trial court submitted Instruction 22, instructing the jury that the defendants did not reasonably believe they had their wives' authority to sign guaranties on their behalf. Ap. 29. The jury obviously resolved the credibility question against defendants Wells and Steele as evidenced by their verdict.

joint property because of "joint tenancy of the entirety," that is, the property would be owned by both parties. Tr. 185-86.

While the defendants were joking about who signed whose wife's name the best, the personal guaranties went around the office and the defendants signed the wives' names. Tr. 186. Kirk-Cox testified that she walked into Russell's office and observed Wells, Steele and Russell signing their wives' names. Tr. 448-49. At that time, Steele said both he and Wells had signed their wives' names before and Wells signed Steele's wife's name better than he did. Tr. 186. The defendants stipulated that the wives' signatures were not authentic.[64] Tr. 618-20.

At trial, Russell identified each of the March 28, 1989 [44] guaranties that were submitted to O'Bannon Bank as being the guaranties that were signed during that meeting. Tr. 187. Both the defendants had substantial prior experience in the banking industry and knew the importance of having authentic signatures. Although the evidence may not have eliminated every possibility inconsistent with guilt, there was substantial testimony from which the jury could properly conclude that the defendants knowingly and willfully submitted the forged guaranties of their wives in order to influence O'Bannon Bank.[65]

[64] Neither defendant testified that they were in any hurry to have the guaranties signed by either wife or that either wife was unavailable to sign.

[65] The Government attempted to offer as rebuttal evidence the fact that both defendants had, in fact, attempted to assert the forged guaranties as a defense to collection efforts by the bank in a subsequent civil suit brought prior to the filing of the criminal charges. However, the trial court would not permit the Government to introduce the evidence. Tr. 1733-35.

The Government submits that the evidence supports the inference of an unlawful intent with respect to the false signatures of the spouses on the O'Bannon Bank guaranties. Viewing the evidence in the light most favorable to the Government, it is clear that the defendants did not intend to bind their wives to the guaranties when they forged their spouses' signatures.

Furthermore, even if the jury found that Wells and Steele had a reasonable, good faith belief that they had authority to sign their own wives' names, the jury could still have found beyond a reasonable doubt that the defendants forged the signatures of Janice C. Steele and Kay Wells in violation of 18 U.S.C. § 1014. The testimony revealed each defendant did not sign the name of his wife. Rather, Wells signed Janice Steele's name and vice versa. [45] The jury obviously rejected the defendants' testimony and could conclude that the defendants signed the other's wife's name and that each defendant did not have authority to do that.[66]

Clearly, there is sufficient evidence to sustain the Government's burden of proof that the defendants possessed the requisite intent to commit the crime charged. *See United States v. Kroh*, 915 F.2d 326, 328 (8th Cir. 1990) (adopting in part *United States v. Kroh*, 896 F.2d 1524, 1530 (8th Cir. 1990)). The defendants' attack on the sufficiency of the evidence comes down to whether the jury should have believed the Government's witnesses or their own. Questions of weight and credibility are for the jury. *United States v. Neavill*, 868 F.2d 1000, 1006 (8th Cir. 1989).

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[66] It should be noted that neither spouse testified in support of the defendants' testimony on this issue.

Materiality

The defendants allege that the Government failed to prove that the spouses' forged signatures were material. In support, defendants contend that the guaranties were not material because some lease contracts were purchased by O'Bannon Bank in February 1989 while the guaranties were not signed until March 28, 1989.

In determining whether a false statement is material, the test is whether it has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made. *Blake v. United States*, 323 F.2d 245, 256 (8th Cir. 1963); *see United States v. Braverman*, 522 F.2d 218, 223-24 (7th Cir.), *cert. denied*, 423 U.S. 985 (1975). The fact that [46] Hayes agreed to purchase leases before the guaranties were actually received is irrelevant since materiality does not depend on actual reliance. *United States v. Whitman*, 665 F.2d at 318; *United States v. Shriver*, 842 F.2d 968, 976 n.11 (7th Cir. 1988); *see e.g., United States v. Kindig*, 854 F.2d 703, 706 (5th Cir. 1988) (element of § 1014, as a matter of law, can be made out when false documents not furnished after bank had made loan); *see also United States v. Johnson*, 937 F.2d 392, 396 (8th Cir. 1991) (in 18 U.S.C. § 1001 prosecution, proof of actual reliance by Government not necessary).

O'Bannon Bank required each owner and his spouse to sign a Personal Unconditional Guaranty in order to fund CSI's lease contracts.[67] Tr. 185, 197, 214, 626, 630, 631. The testimony revealed the bank gave equal

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[67] In Missouri, if a bank seeks to recover a married couple's personal assets, a guaranty is required that is signed by both the husband and the wife. Tr. 1323.

weight to the credit strength of the lessee, the repurchase agreement, and the personal guaranties of the principals. Tr. 687. Prior to receiving the guaranties, some contracts were "funded" by O'Bannon with the understanding that the guaranties would be provided at a later time. Tr. 732.

In response to the question of whether the forged guaranties [47] had the capacity to influence the actions of O'Bannon Bank, Hayes unequivocally stated that if he had known the signatures of the wives were not their genuine signatures, O'Bannon Bank would not have had any credit transactions of any kind with CSI because it required the genuine signatures of the owners and their wives. Tr. 632. The Eighth Circuit has held the issue of materiality in false statements charges brought under 18 U.S.C. § 1014 is a question of law for the trial court to decide. *United States v. Ribaste*, 905 F.2d at 1143. The evidence presented, taken as a whole and viewed in the light most favorable to the Government, is clearly sufficient. Tr. 1737. The defendants' appeal fails on this argument.

* * * * *

[seal omitted]

U.S. Department of Justice

United States Attorney
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July 3, 1995

Michael E. Gans
Clerk of the Court
United States Court of Appeals
for the Eighth Circuit
1114 Market Street
St. Louis, MO 63101

Re: United States v. Jerry Wells, et al.
No. 93-3924/93-3932/94-1031WMJ

Dear Mr. Gans:

On Thursday, June 22, 1995, this office received an order entered at the direction of the Court directing the United States to submit a letter brief commenting on the affect of the ruling in the case *United States v. Michael E. Gaudin*, 1995 WL 360212 (U.S.) on *United States v. Jerry Wells, et al.*, 93-3924/93-3932/94-1031WMJ. The United States addresses the affect of the *Gaudin* ruling on the conviction under Count Two of the Indictment for violation of 18 U.S.C.

§1014.[1] The Supreme Court in *Gaudin* held that the Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt on every element of the crime with which he is charged; thus, the trial judge's refusal to allow the jury to pass on the "materiality" of Gaudin's false statement infringed on that right.

MATERIALITY IS NOT AN ESSENTIAL ELEMENT OF 18 U.S.C. §1014

Justice Rehnquist's concurring opinion puts the holding of this case into perspective when he states "there are issues in this area of law which . . . are not disposed of by the Court today . . . . Whether 'materiality' is indeed an element of every offense under 18 U.S.C. §1001 is not at all obvious from its text." *Gaudin*, 1995 WL 360212, at p. 11. He specifically states that the Court does *not* resolve the conflict of whether "materiality" refers only to the first clause of §1001, omissions, or whether it refers to both clauses of §1001, omissions and affirmative

[1] Defendants Wells and Steele were convicted under Count One of the Indictment of 18 U.S.C. §371. A conviction under 18 U.S.C. §371 requires the jury to find beyond a reasonable doubt that there was an agreement to violate the law and that an overt act in furtherance of the conspiracy was completed. *See, e.g., United States v. Hoelscher*, 764 F.2d 491, 494 (8th Cir. 1985). Both the conspiracy and overt acts, such as the submission of the wives' forged guaranties, were proven. Conspiring to commit a crime is an offense separate and distinct from the crime which may be the object of the conspiracy. *Pereira v. United States*, 347 U.S. 1, 11 (1954). Accordingly, a finding of materiality on this count is not required. Therefore, the conviction under Count One is unaffected by the Supreme Court's ruling in the *Gaudin* case.

false statements.[2] *Id.* Based on the concessions of the Government in the *Gaudin* case, the Court "merely assumes that materiality is, in fact, an element of the false statement clause of §1001."[3] *Id.* However, Justice Rehnquist points out that the Supreme Court has note that " '[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.' " *Staples v. United States*, 114 S. Ct. 1793, 1796 (1994) (quoting *Liparota v. United States*, 471 U.S. 419, 424 (1985)).

Unlike 18 U.S.C. §1001 (the offense of conviction in the *Gaudin* case), the plain language of 18 U.S.C. §1014[4] does not include the term "material". Indeed,

[2] This premise is supported by court which have specifically held that materiality is not an element of making a false statement. *See, e.g., United States v. Elkin*, 731 F.2d 1005, 1009 (2d Cir.); *cert. denied*, 469 U.S. 822 (1984).

[3] The conviction under Count Two was based on a false statement (not a material fact that was concealed or omitted), that is, the owners submitted guaranties to O'Bannon Bank which falsely claimed that the wives would guaranty the bank's purchase of the leases; however, this was untrue because, as the jury found, the owners' wives' signature were forged. Here, the United States does not concede that materiality is an essential element of §1014.

[4] 18 U.S.C. §1014 states, in pertinent part:

Whoever knowingly makes any false statement or report, . . . for the purpose of *influencing in any way* the action of . . . any institution the accounts of which are insured by the Federal Deposit Insurance Corporation . . . upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of

the Supreme Court's holding in *Kay v. United States*, 303 U.S. 1, 5-6 (1938), addressed a direct predecessor statute with the identical pertinent language and held that an alleged lack of materiality of a false statement intended to deceive was not a defense. Despite the statutory language of §1014, courts have assumed that materiality is an element when determining whether a crime has been committed under the statute. *United States v. Shriver*, 842 F.2d 968, 976-77 (7th Cir. 1988). Courts have inferred the judge-made limitation of "materiality" in order to exclude trifles from its coverage. *See, e.g., United States v. Corsino*, 812 F.2d 26, 30 (1st Cir. 1987) (referring to §1001). Because the legislature did not include materiality in 18 U.S.C. §1014, the definition of the elements of the criminal offense cannot include materiality and the jury's failure to deliberate on that issue cannot trigger the Fifth and Sixth Amendments of the Constitution.

In general, a statement is false if it is untrue at the time it was made, or it was made with reckless indifference as to its truth or falsity, and it was made with an intent to deceive.[5] *See United States v. Marley*, 549 F.2d 561 (8th Cir. 1977). Under 18 U.S.C. §1014 the only intent necessary is an intent to influence the bank, not an intent to harm the bank or

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security therefore, shall be [guilty of a crime]. (emphasis added).

[5] As the basis for the conviction under Count Two, the banker at O'Bannon Bank testified that a personal guaranty was required from the owners and their wives in order to fund CSI's lease contracts and that he had known the signatures on the guaranties were not genuine, he would not have had credit transactions of *any* kind with CSI. Tr. 630-32.

profit personally. *United States v. Whitman*, 665 F.2d 313, 318 (10th Cir. 1981); *see also United States v. Sabatino*, 485 F.2d 540 (2d Cir. 1973), *cert. denied*, 415 U.S. 948 (1974); *United States v. Wilcox*, 919 F.2d 109, 112 (9th Cir. 1990) (making false statement with intent to influence prohibited regardless of motive). Section 1014 is not dependent upon the accomplishment of that purpose, and thus is a crime of subjective intent (requiring neither reliance by the bank officers nor an actual defrauding). *See United States v. Thompson*, 811 F.2d 841, 844 (5th Cir. 1987); *see also, United States v. Davis*, 953 F.2d 1482, 1495 (10th Cir.), *cert. denied*, 112 S. Ct. 2286 (1992); *United States v. Copple*, 827 F.2d 1182, 1187 (8th Cir. 1987), *cert. denied*, 484 U.S. 1073 (1988) (proof that bank was influenced by or actually relied on the false statement is not necessary for §1014 violation). Therefore, materiality is not an element which must be proven beyond a reasonable doubt by to the jury to establish a defendant's guilt.

The legislature's intention regarding the issue of materiality is obvious. First, the term "material" is not included in the statute. Second, the intent required in the statute is incompatible with a finding of materiality by the jury. "Materiality" (or "capacity to influence"[6]) is determined by the affect the statement has or could have *on the person to whom the false statement is made.* However, statutorily, the intent element of §1014 is accomplished by the subjective intent *of the person making the false state-*

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[6] The "Notes on Use" section of instruction 6.18.1014 state that materiality is tested by the "capacity to influence." *See also, United States v. Staniforth*, 971 F.2d 1355, 1358 (7th Cir. 1992).

ment, that is, his desire to influence the bank officer (whether or not an actual reliance by a bank officer occurs). Therefore, a request for the jury to find that false statements are material under §1014 misstates the law. *See, e.g., United States v. Cleary*, 565 F. 2d 43, 46 (2d Cir. 1977), *cert. denied*, 435 U.S. 915 (1978). It does not lie with one knowingly making false statements with intent to mislead a banker to say that the statements were not influenced or the information not important. *Id.*; *Kay v. United States*, 303 U.S. at 5-6; *United States v. Blumenthal*, 945 F.2d 280, 282 (9th Cir. 1991). Therefore, under §1014, the statutory intent (which requires the jury to focus on the defendant making the false statement) is incompatible with "materiality" or "capacity to influence" (which would require the jury to focus on the person to whom the statement is directed; however, reliance, by law, is not required).

Accordingly, materiality is not an essential element of the crime which must be submitted to the jury.[7] The determination of materiality is a judicial expansion of the elements which, because it is judicial

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[7] Other instructions in the 8th Circuit Model Criminal Jury Instructions involving fraud and contemplating false statements (as opposed to a concealment) do not specifically set forth "materiality" as an essential element. *See, e.g.*, 6.18.1005, 6.18.1006A, 6.18.1341 (also referring to 18 U.S.C. §1343), 6.18.1344. Other statutes involving false statements have been found not to include "materiality" as an element for the jury. *See, e.g., United States v. Hoag*, 823 F.2d 1123 (7th Cir. 1987) (under §1010 statute in which word "material" does not appear, jury not required to find that element); *United States v. White*, 27 F.3d 1531 (11th Cir. 1994)(under §287 statute, term "material" does not appear and jury not required to find that element).

and not statutory, does not trigger the Fifth and Sixth Amendments of the Constitution concerning the jury's failure to deliberate and the convictions should be upheld.

FAILURE TO DELIBERATE ON THE ISSUE OF MATERIALITY WAS HARMLESS ERROR

Here, even if the Court determines that materiality is an element of §1014 which must be proven to the satisfaction of the jury beyond a reasonable doubt, the error was harmless and the convictions should be upheld.[8] The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. *Sullivan v. Louisiana*, 113 S.Ct. 2078, 2080 (1993). The Supreme Court has applied harmless error analysis to a wide range of errors and has recognized that most constitutional error can be harmless. *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991). In particular, the Supreme Court has subjected jury instructions plagued by constitutional error to harmless-error analysis. *See, e.g., Yates v. Evatt*, 500 U.S. 391, 402 (1991); *Pope v. Illinois*, 481 U.S. 497, 502-04 (1987). This broad application of the harmless error doctrine is designed to conserve judicial resources by avoiding retrial if it can be said beyond a reasonable doubt that the jury's verdict was not affected by the erroneous instruction. *Id.* at 502.

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[8] In the *Gaudin* case, the Government did not argue before the Supreme Court that the error in its case was harmless and thus the Court had not occasion to review the Court of Appeals' conclusion. *Gaudin*, 1995 WL 360212, at p. 12.

The test for determining the materiality of a false statement is whether it had the capacity to influence. *See United States v. Haddock*, 956 F.2d 1534, 1550-51 (10th Cir.), *cert. denied*, 113 S. Ct. 88 (1992); *United States v. Shriver*, 842 F.2d at 976 n. 11.[9] Obviously, the jury, if the instruction on materiality were submitted to the jury, would have found that the guaranties not only had the capacity to influence the bankers but that they *actually* influenced the bankers because they acted. James Hayes testified that his bank required each owner and his spouse to sign a Personal Unconditional Guaranty in order to fund CSI's lease contracts. Tr. 630-31. Prior to receiving the guaranties, some contracts were "funded" by O'Bannon Bank with the understanding that the guaranties would be provided at a later time. Tr. 732. In response to the question of whether the forged guaranties had the capacity to influence the actions of O'Bannon Bank, Hayes unequivocally stated that if he had known the signatures of the wives were not their genuine signatures, O'Bannon Bank would not have had any credit transactions of any kind with CSI because it required the genuine signatures of the owners and their wives. Tr. 632. There is no credible evidence in the record to support the defendants' contention that the bankers acted for *any* reason other than the fact that they received the forged guaranties of the defendants' wives as a condition of doing business with CSI.

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[9] The United States herein incorporates by reference the sections relating to factual matters considering materiality which were previously set forth in its "Brief for Appellee/ Cross-Appellant", and with particular focus on pp. 27-29 and 45-47.

In this case, the evidence was overwhelming against the defendants on the other essential elements of the crime of making a false statement and conspiracy to do the same.[10] The materiality of the defendants' false statements have also been clearly established. Therefore, the failure to submit the issue to the jury was harmless beyond a reasonable doubt under the standard of *Chapman v. California*, 386 U.S. 18, 24 (1967). *See United States v. Valdez*, 594 F.2d 725, 728 (9th Cir. 1979). No reasonable jury could have reached any other conclusion. Therefore, the convictions of Defendants Wells and Steele on all counts should be upheld by the Court.

Sincerely yours,

Stephen L. Hill, Jr.
United States Attorney

By /s/ MARK C. THOMPSON

MARK C. THOMPSON
Assistant United States Attorney

cc: James Wyrsch, Esquire

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[10] After an eight day trial, the jury returned guilty verdicts in less than 2 1/2 hours on both the counts that were submitted.

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July 5, 1995
(Via Hand Delivery)

Michael Gans, Clerk
U.S. Court of Appeals
for the Eighth Circuit
U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

In re: United States v. Wells and Steele, Case Nos. 93-3924, 93-3932, 94-1031WMJ

Dear Mr. Gans:

A. INTRODUCTION

This letter brief is sent to the Court pursuant to the Court's Order of June 22, 1995 directing the parties in the above referenced appeals to file five copies of letter briefs not to exceed five pages, on or before

July 5, 1995, upon the effect of *United States v. Michael E. Gaudin*, No. 94-514, 19095 WL 360212 (U.S. June 19, 1995). Enclosed please find five copies of letter brief submitted on behalf of the Appellants, Jerry E. Wells and Kenneth Steele, hereinafter referred to the "Defendants."

B. RECORD BELOW

Defendants respectfully suggest that the *Gaudin* opinion requires reversal of the convictions under Counts I and II of the Indictment in this case. Count I of the Indictment in this case and as submitted to the jury charged Defendants with making material false statements to various banks in violation of 18 U.S.C. §§ 371, 1014 and 2. (A. at pp. 29-36.)[1] Count II as charged and submitted to the jury involved the Defendants knowingly submitting forged guarantees of their spouses to O'Bannon Bank in violation of 18 U.S.C. § 1014. (A. at pp. 36-37.) However, Defendants submit that, with regard to both Counts I and II, the court instructed the jury that it had determined that any false statements were material as a matter of law. Defendants' objections in this regard were overruled by this Court. See Tr. pp. 1736-1749. There were also objections by the Defendants to the court telling the jury that he had determined certain statements to be material as a matter of law. (Tr. pp. 1737-1739.) The objections to not instructing the jury on the issue of materiality and otherwise were also made under the

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[1] References to the Trial Transcript will hereinafter be cited as "Tr. p. " to the Appendix as "A. at p. "; to the *Gaudin* Opinion as "Op. p. ", and to the Addendum to this letter brief as "Add. at p. ."

sixth and fifth amendments to the United States Constitution. See, *e.g.*, Tr. p. 1739. Over Defendants' objections (and with the court also indicating that materiality in this case should be a factual issue for the jury), the trial court made a declaration at the close of all of the evidence under both counts of the Indictment as submitted to the jury that the financial reports of Copytech were material, that the lease agreements were material, and that the guarantees signed were also material. Instruction 15 (A. at pp. 91-93), regarding Count I, did not define materiality, although there was a mention of materiality under Elements One, 4b (material false lease agreements were submitted to O'Bannon Bank, and material portions of the lease contracts—CMP schedules—were not submitted to the O'Bannon Bank), and 40 (materially false lease contracts were submitted to Bank IV and material portions of the lease contracts —CMP schedules—were not submitted to Bank IV). Under paragraph 4a of Instruction 15, which is identical factually to the submission under Count II (A. at pp. 94-95), there was no submission of materiality to the jury, *i.e.*, false personal guarantees to O'Bannon Bank. Instruction No. 18 (Add. at p. 26), given by the court to assist the jury in making a decision under Count I, set forth the elements of the offense under 18 U.S.C. § 1014. Element Two of this Instruction stated: "that the defendant made or caused to be made a false statement to the bank knowing that it was false, or withheld information of material fact from the bank." The court in Instruction 18 also explained that Count I involved false statements to both O'Bannon Bank and Bank IV. No definition of materiality was ever given to the jury under either Count I or Count II. In Instruction 20, the court gave the

following instruction to the jury: "The materiality of the statement or representation alleged to be false or concealed is not a matter with which you are concerned and should not be considered by you in determining the guilt or innocence of the defendant."[2]

C. THE GAUDIN OPINION

In *United States v. Gaudin*, the Supreme Court held that the fifth and sixth amendments to the United States Constitution require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime in which he is charged. *Gaudin* was a prosecution under 18 U.S.C. § 1001. In this prosecution, the government conceded that materiality is an element of the offense that the government must prove under § 1001. See pp. 3-5 of the Opinion. The Court held that materiality should have been submitted to the jury for its determination. (Op. pp. 4-10). The Supreme Court affirmed the Ninth Circuit opinion in this regard, which held that it was "plain error" for the court to fail to submit the issue of materiality to the jury. 28 F.3d at 943, 951-52 (9th Cir. 1994). The concurring opinion in *Gaudin* indicated, at p. 13, that

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[2] Attached as an addendum to this letter brief are Instructions 1-26, as the Court may want to look at all of the instructions to make its decision in this case. Counsel also will be asking the United States District Court to submit the entire instructions given to the Court as a supplemental appendix, as well as, if appropriate, the Defendants' refused Instructions A-E, one or more of which may touch upon the materiality issue. Instructions 12, 13, 15, 18, 22, 23 and 24 also appear in the Government's Appendix at pp. 17-33.

the government had not argued that the error in this case was either harmless or not plain.

D. DISCUSSION

There appears to be no reason to treat § 1001 prosecutions differently than prosecutions under 18 U.S.C. § 1014 for purposes of the decision in *Gaudin*. *See United States v. Staniforth*, 971 F.2d 1355, at 1357-1358 (7th Cir. 1992) (although the court does not decide the issue, at p. 1359). This Court, in *United States v. Ribaste*, 905 F.2d 1140, 1143 (8th Cir. 1990), as well as many other circuits, has held that materiality is an essential element of the offense under § 1014. *See United States v. Staniforth, id.* at 1358. *See also*, Manual of Model Criminal Instructions for the District Courts of the Eighth Circuit, Instruction No. 6.18.1014, at pp. 224-25 (West 1994 ed.). In *United States v. Ribaste*, the court held it was proper for the court to inform the jury that the allegedly false statements have been found to be material as a matter of law, at p. 1143.

Thus, it is clear that the *Gaudin* opinion requires reversal of Counts I and II for failure to submit materiality to the jury. The Instruction submitting Count II (No. 20) clearly withdrew materiality from the jury and the language in Count II in this regard clearly applied to the submission under Count I (Instructions 15 and 18). In fact, in Instruction 18, the court told the jury "In these instructions I define the elements of making a false statement to a bank in relation to the charges that the defendants made false statements to a bank. You may use these definitions in considering whether the defendants conspired to make false statements to the banks, keeping in mind

that the charges in Count One charge a conspiracy to make false statements and not that the crime of making a false statement was committed." (Add. at p. 26.) This paragraph of Instruction 18 was modeled after Eighth Circuit Pattern Instruction 5.06C, Note on Use 4, and was meant to clearly refer to Instruction 20, including, it is respectfully submitted, the reference in Instruction 20 to materiality. The court chose not to define materiality, which was consistent with its determination to withdraw materiality from the jury. Moreover, Instruction No. 15 in paragraph 4a did not even mention the word materiality. The court's Instructions relieved the government of its burden of persuasion beyond a reasonable doubt of every essential element of the crime. Thus, it is clear that the Instructions as a whole were erroneous. *Francis v. Franklin*, 471 U.S. 307 (1985). CF *Karras v. Leapley*, 974 F.2d 71 (8th Cir. 1992) (court defines issue as whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the constitution; general instructions, for instance, do not dissipate error in challenged portions of instruction).

E. RETROACTIVITY OF GAUDIN

In the leading case of *Griffith v. Kentucky*, 479 U.S. 314 (1987), a majority of the Court held that failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication. At p. 322. *See e.g. United States v. One Parcel of Real Property*, 27 F.3d 327, at pp. 329-30 (8th Cir. 1994). Since this case is on direct appeal, the holding of *Gaudin* applies and requires reversal.

F. PLAIN ERROR ISSUE

There is, under the facts of this case, no "plain error" as the matter was adequately preserved in the lower courts and is now briefed on appeal. Initially, because of existing law in this circuit, the issue was not briefed. *See, e.g.*, Eighth Circuit Pattern Instruction No. 6.18.1014, Notes on Use 1. However, the Court has given both parties the opportunity to brief the issue. In any event, if a "plain error" analysis were to be applied, it was plain error for the trial court in this case not to instruct the jury on the issue of materiality. *United States v. Gaudin*, 28 F.3d 943, 951-52 (9th Cir. 1994). *See also United States v. Bencs*, 28 F.3d 555, 564 (6th Cir. 1994) (plain error when court failed to instruct jury that knowledge of illegality of restructuring was necessary component of unlawful restructuring to evade transaction reporting requirements), *cert. denied*, 115 S.CT. 915 (1995).

G. HARMLESS ERROR

The error in this case was not harmless. Given the fact that there was constitutional error, there must be a showing, beyond a reasonable doubt, that the error did not contribute to the verdict for there to be harmless error. *Chapman v. California*, 386 U.S. 18, 22 (1967); *United States v. Schrader*, 10 F.3d 1345, 1348-50 (8th Cir. 1993) (reversal required when erroneous instruction allowed jury to convict defendant without finding one element of the crime charged). In *Schrader*, at p. 1349, fn 1, the court cited to *United States v. Voss*, 787 F.2d 393, 398 (8th Cir.), *cert. denied*, 479 U.S. 88 (1986), which questioned, without deciding the issue, whether an instruction permitting

the jury to convict without properly finding each element of the crime may ever be harmless error. *See generally, United States v. Olano*, 113 S.Ct. 1770 (1993); *United States v. Retos*, 25 F.3d 1220, at pp. 1230-32 (3rd Cir. 1994). Defendants would also specifically refer to the Court to not only the trial court's concerns that materiality was a jury issue (Tr. pp. 1736, 1737), but also Defendants' briefing on the materiality issue in this Court, particularly their initial brief at pp. 39-43 and 49-51, which clearly shows how materiality was in fact sharply contested both at the trial and on appeal in this case.

H. CONCLUSION

In view of the foregoing, it is respectfully submitted to the Court that, based on the *Gaudin* decision, the convictions under both Counts I and II for both Defendants must be reversed and remanded for a new trial.[3]

Respectfully submitted,

WYRSCH ATWELL MIRAKIAN LEE
& HOBBS, P.C.

By: /s/ JAMES R. WYRSCH

JAMES R. WYRSCH

CC: Matt Whitworth (Via Hand Delivery)
Mark Thompson (Via Hand Delivery)

[3] The relief prayed for is in addition to the relief prayed for in Defendants' briefs before this Honorable Court.